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No. 746

In the
Supreme Court of the United States
OCTOBER TERM, 1967.

JOSEPH P. GLIMCO,
Petitioner,
vs.
THE HONORABLE JAMES B. PARSONS,
United States District Court Judge,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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United States District Court Judge,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Joseph Glimco, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, on a Petition for Writ of Prohibition in a case entitled *Joseph P. Glimco* v. *The Honorable James B. Parsons,* United States District Judge of the United States District Court for the Northern District of Illinois, No. 16446.

JUDGMENT OF THE COURT BELOW

In this cause, as an original action filed in the United States Court of Appeals for the Seventh Circuit, a Petition for Writ of Prohibition was filed by the Petitioner. The government filed its Answer to the Petition for Writ of Prohibition and the Petitioner filed a reply to the government's Answer to the Petition for Writ of Prohibition. The Court of Appeals for the Seventh Circuit, on September 22, 1967, denied the Petition for Writ of Prohibition without opinion.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit denying the Petition for Writ of Prohibition filed by the Petitioner herein, was entered on the 22nd day of September, 1967. This order appears in the Appendix hereto. This Petition is filed within thirty days of the denial of the Petition for Writ of Prohibition by the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is collaterally estopped from relitigating by reindictment the sufficiency of certain counts in an indictment where a trial court had dismissed the same counts and the government failed to appeal the granting of the motion to dismiss.

2. Does the successor trial court lack jurisdiction to review a final judgment as to certain counts in an indictment which were dismissed by a predecessor trial court and not appealed by the government.

STATEMENT OF THE CASE

On December 17, 1964, an indictment, 64 CR 724, was returned in the United States District Court for the Northern District of Illinois, charging the Petitioner, Joseph Paul Glimco, and two other defendants, Don Ross and Frank Pesce, with a violation of Title 29, Section 186(b), of the United States Code, in that the Petitioner was charged with accepting gifts from two alleged employers, defendants Ross and Pesce.

The Petitioner, Joseph Glimco, filed a motion to dismiss the indictment on the ground that the indictment, and each count thereof, failed to charge a crime prescribed by Congress, and on August 25, 1965, the District Court (Judge Igoe) granted the motion. The Government did not appeal pursuant to Section 3731, Title 18, United States Code.

Almost one year later on June 1, 1966, a Grand Jury returned the present indictment, No. 66 CR 365. This indictment charged the Petitioner, Joseph Glimco, with the identical offenses in four counts, Counts Four, Five, Six and Eight, and he is the sole defendant named in these four counts. Some counts against Joseph Glimco were dropped, apparently because of the running of the Statute of Limitations. Three alleged acts occurred in December, 1961, and one act allegedly occurred in May, 1962.

The said four counts again allege acceptance of gifts from employers, Ross and Pesce, in violation of Title 29, Section 186(b) of the United States Code. The present indictment, 66 CR 365, by its form and content under Counts Four, Five, Six and Eight, is in the precise language and is based on the same events and incidents as the previous indictment, 64 CR 724. No change whatsoever was made in these four counts which are the only counts

charging the Petitioner with a violation of law. (See App. 19a-26a)

The Government, however, contends that there was a change in a paragraph incorporated from Count One. In the new indictment, the Petitioner, Joseph Glimco, was not charged in Count One. The Government contended that paragraph 6 of Count One was changed and it was incorporated by reference in each of Counts Four, Five, Six and Eight. The Petitioner contends that the first eight paragraphs of Count One are merely "*descriptio personae*" and that the allegations of each of Counts Four, Five, Six and Eight allege jurisdiction in the charging portion, to wit: paragraph 2, of said Counts, Four, Five, Six and Eight. They stand dismissed by Judge Igoe on their charging contents. They were presented unchanged to Judge Parsons who ruled *sub silentio* that the government was not estopped and he had jurisdiction to review Judge Igoe.

The Government, in its second indictment, did not change the form of the indictment as to the four counts. The allegations are identical; and as stated the incorporated paragraphs of the additional description did not change the basic allegations of jurisdiction charged. Judge Igoe did not dismiss the indictment for failure to allege jurisdiction and consequently the second indictment did not obviate any jurisdictional deficiency.

Your Petitioner filed, on November 17, 1966, a motion to dismiss the second indictment, 66 CR 365. A copy of this motion together with the supporting exhibits is attached hereto, made a part hereof and marked Court of Appeals Exhibit A. (App. 9a) Your Petitioner did not again argue the insufficiency of the indictment as the four counts in both indictments were identical. (App. 19a-26a) The grounds stated in the second motion to dismiss in-

volved two principal contentions; First, that the United States Government was bound by the decision of Judge Igoe, on which there was no review sought, and that they were collaterally estopped from relitigating the sufficiency of the four counts in the new indictment which were identical with the four counts in the old indictment. Second, a Judge of the District Court has no authority to hear a matter of law or fact previously determined by another Judge of the same District Court. The Petitioner contends that to allow one judge to overrule a previous final decision in the same Court on the same identical issues, once determined between the parties, would destroy the orderly and dignified procedure of litigating matters before a court, and that Judge Parsons did not have authority to review a decision of Judge Igoe which, so far as the parties were concerned, on the identical counts, was a final judgment.

The Respondent, The Honorable Judge James B. Parsons, the trial Judge, denied the second motion to dismiss, on April 4, 1967. However, Judge Parsons did not pass on the sufficiency of the new or second indictment as the question was not raised. He decided that the government was not collaterally estopped and that he had the power to review the decision of Judge Igoe.

The motion before Judge Parsons was denied without opinion. The Petition for Writ of Prohibition in the Court of Appeals followed (App. 1a). Thereafter the government filed its Answer (App. 37a). The Petitioner replied (App. 47a). The United States Court of Appeals for the Seventh Circuit entered its order denying the Petition for Writ of Prohibition on September 22, 1967 (App. 52).

STATUTE INVOLVED

Section 3731, Title 18, U.S.C. provides as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:
>
> • • • •
>
> "from a decision or judgment setting aside or dismissing any indictment or information or any count throughout except for a direct appeal to the Supreme Court of the United States is provided by this section."

REASON FOR GRANTING THE WRIT

THE INTEGRITY OF FINAL JUDGMENTS OF INFERIOR UNITED STATES COURTS IS A MATTER OF PRIMARY CONCERN TO THIS COURT. THIS COURT SHOULD EXERCISE ITS SUPERVISORY JURISDICTION TO OBVIATE REPETITIVE IDENTICAL PROSECUTIONS INSTITUTED TO OBTAIN CONFLICTING DECISIONS WHICH FOMENT DISHARMONY AND UNDERMINE THE AUTHORITY OF THOSE COURTS.

Petitioner recognizes that this court will not usually grant certiorari to review a non-final judgment, such as one remanding the case to the district court for trial. The Petitioner suggests to the court, however, that there is an important and clear cut issue of law that is fundamental to the further conduct of the case and that as such it qualifies as a basis for certiorari. *Land* v. *Dollar,* 330 U.S. 731, 734, n.2; *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682, 685, n.3. This court has reviewed and reversed the refusal of the Court of Appeals to issue a writ of mandamus that would have required the district court to hold a jury trial as to a certain issue rather than try the case without a jury. *Beacon Theatres* v. *Westover,* 359 U.S. 500.

In the case at bar, the first indictment No. 64 CR 724, was dismissed by Judge Michael L. Igoe without opinion. The government did not avail itself of its right of appeal pursuant to the provisions of Section 3731, Title 18, United States Code. Approximately a year later the second indictment was returned which the Petitioner contends is identical as to form and substance as the indictment which was dismissed by Judge Igoe. When the case came on before Judge Parsons, a motion to dismiss the indictment was made on two grounds: first, that the government was collaterally estopped and, second, that the Court lacked jurisdiction to review the finality of Judge Igoe's order dismissing the indictment. The successor trial court, presided over by United States District Judge James B. Parsons, denied the motion without opinion. The application to the United States Court of Appeals for the Seventh Circuit for the Writ of Prohibition followed. It was denied without opinion.

The Petitioner submits that these decisions run contrary to this court's opinion in *United States* v. *Oppenheimer,* 242 U.S. 85. Mr. Justice Holmes in that case stated as follows:

> "We do not suppose that it would be doubted that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words." *United States* v. *Oppenheimer,* 242 U.S. 85.

The Petitioner has set forth the words in each of the two indictments in the Appendix (at 19 A through 26 A). The identity is at once apparent. The government has contended that the addition of the words "that the said Best was engaged in an industry affecting commerce" in a count where the Petitioner was not charged but which was incorporated by reference in the counts as set forth in the Appendix constituted a change in the second indict-

ment. It is quite clear that the addition of these few words is merely *descriptio personae,* as the first eight paragraphs of Count One describe generally the parties involved in the alleged conspiracy. Petitioner was dropped from Count One, the conspiracy count, in the second indictment. The Petitioner submits that the exclusion of him as a defendant in the first count could have no effect on the finality of the order as to the other counts. Those counts, as can be clearly seen from the Appendix (19A through 26A) expressly contain their own allegation of jurisdiction, and this supposed distinction is purest balderdash.

The decisions below are contrary not only to this Court's decisions in *United States* v. *Oppenheimer,* 242 U.S. 85 and *U.S.* v. *Adams,* 281 U.S. 202, but also Courts of Appeals; the Ninth Circuit in *Cosgrove* v. *U.S.,* 224 F. 2d 146 and the District of Columbia in *Laughlin* v. *U.S.,* 344 F. 2d 187.

Of equal importance to the orderly administration of justice is the manner of review of a District Court decision.

When one court has fully considered and decided a matter, the orderly administration of justice requires that it should be followed until reviewed. In *Appleton* v. *Smith,* 1 Federal Cases 1075, Judge Miller, sitting as a Circuit Justice in the District of Arkansas, in 1870, stated:

> "It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other." *Appleton* v. *Smith,* 1 Federal Cases 1075.

In *United States* v. *Mathies,* 1965, 3 Cir., 350 F.2d 964, a second court upheld the subsequent indictment even

though it was contrary to the action of the first judge's order dismissing the first indictment. But the Court in that case stated:

> "It is to be noted, however, that the indictment which Judge Miller sustained was not the same indictment which had been dismissed by Judge Willson, nor was it *identical in its charging language.*" (Emphasis supplied) *United States* v. *Mathies,* 350 F.2d 964.

In the case before this court one need only look at the two indictments set, as they are, line for line (App. 19A 25A), to see that they are in fact identical in their charging paragraphs.

The Petitioner contended below that the Judge Parsons sitting in the District Court was completely without jurisdiction to review Judge Igoe, also sitting in the same court.

The integrity of final judgments of inferior United States Courts should be a matter of great concern to this court. The practice of repetitive identical prosecutions instituted to obtain conflicting decisions can only foment disharmony and undermine the authority of those courts. That the Court of Appeals for the Seventh Circuit has sanctioned this practice without opinion in fact encourages inferior Courts not to respect each other's opinions, and to act as Courts of review, when the right of review has not been pursued in the manner provided by law.

CONCLUSION

Wherefore, for the above and foregoing reasons Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
Attorney for Petitioner

APPENDIX

In The
United States Court of Appeals
For The Seventh Circuit

No. 16446 Original

Joseph Glimco,
Petitioner,
vs.
The Honorable James B. Parsons, United States District Judge of The United States District Court for The Northern District of Illinois,
Respondent.

PETITION FOR WRIT OF PROHIBITION
(Filed Sep 8 1967)

Now comes Joseph Glimeo, Petitioner, and files this his Petition for a Writ of Prohibition against The Honorable James B. Parsons, United States District Judge of the United States District Court for the Northern District of Illinois, and respectfully represents:

1. On December 17, 1964, an indictment, 64 CR 724, was returned in the United States District Court for the Northern District of Illinois, charging the Petitioner, Joseph Paul Glimco, and two other defendants, Don Ross and Frank Pesce, with a violation of Title 29, Section 186(b) of the United States Code, in that the Petitioner was charged with accepting gifts from two alleged employers, defendants Ross and Pesce.

2. The Petitioner, Joseph Glimco, filed a motion to dismiss the indictment on the ground that the indictment, and each count thereof, failed to charge a crime prescribed by Congress, and on August 25, 1965, the District Court (Judge Igoe) granted the motion. The Government did not appeal pursuant to Section 3731, Title 18, United States Code.

3. Almost one year later on June 1, 1966, a Grand Jury returned the present indictment, No. 66 CR 365. This indictment charged the Petitioner, Joseph Glimco, in four counts, Counts Four, Five, Six and Eight, and he is the sole defendant named in these four counts. Some counts against Joseph Glimco were dropped, apparently because of the running of the Statute of Limitations. Three alleged acts occurred in December, 1961, and one act allegedly occurred in May, 1962.

4. The said four counts again allege acceptance of gifts from employers, Ross and Pesce, in violation of Title 29, Section 186(b) of the United States Code. The present indictment, 66 CR 365, by its form and content under Counts Four, Five, Six and Eight, is in the precise language and is based on the same events and incidents as the previous indictment, 64 CR 724. No change whatsoever was made in these four counts which are the only counts charging the Petitioner with a violation of law.

5. Your Petitioner filed, on November 17, 1966, a motion to dismiss the second indictment, 66 CR 365. A copy of this motion together with the supporting exhibits is attached hereto, made a part hereof and marked Court of Appeals Exhibit A. Your Petitioner did not again argue the insufficiency of the indictment as the four counts in both indictments were identical. (See Exhibit C of Court of Appeals Exhibit A herein.) The grounds

stated in the second motion to dismiss involved two principal contentions: First, that the United States Government was bound by the decision of Judge Igoe, on which there was no review sought, and that they were collaterally estopped from relitigating the sufficiency of the four counts in the new indictment which were identical with the four counts in the old indictment. Without elaboration of all authorities[1] for this proposition, the Court's attention is respectfully drawn to an opinion in *Laughlin* v. *United States,* 344 F.2d 187, 189:

> "The doctrine of collateral estoppel, developed largely in the context of civil litigation, is designed to prevent repetitious litigation of the same issue by the same parties. It applies generally to preclude relitigation of an issue resolved by final judgment in a prior legal action. While some of the policies underlying the application of the doctrine may be different, it is well established that the principles of collateral estoppel apply in criminal as well as in civil litigation. This much is not controverted." *Laughlin* v. *United States,* C.A.D.C., 344 F.2d 187, 189-190.

and, Second, a judge of the District Court has no authority to hear a matter of law or fact previously determined by another judge of the same District Court. The Petitioner contends that to allow one judge to overrule a previous final decision in the same Court on the same identical issues, once determined between the parties, would destroy the orderly and dignified procedure of litigating matters before a court, and that Judge Parsons did not have authority to review a decision of Judge Igoe which, so far as the parties were concerned, on the identical counts, was a final judgment.

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[1]Other authorities are to be found in the memorandum to the second motion to dismiss in Exhibit A attached hereto.

6. The Respondent, The Honorable Judge James B. Parsons, denied the second motion to dismiss, on April 4, 1967. However, Judge Parsons did not pass on the sufficiency of the new or second indictment as the question was not raised. He decided that the government was not collaterally estopped and that he had the power to review the decision of Judge Igoe.

We submit this determination by Judge Parsons is so patently erroneous, as to require this Court's intervention.

> "The rule is succinctly stated in *Southern P. R. Co.* v. *United States,* 168 U.S. 1, 48, 42 L. ed. 355, 376, 18 Sup. Ct. Rep. 18:
>
> > 'The general principal announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.'"
>
> * * *
>
> "The contention of the government seems to be that the doctrine of res judicata does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action,

even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." *United States* v. *Moser*, 266 U.S. 236, 241, 242.

Notwithstanding that the foregoing constitutes the supreme law of the land, said Judge Parsons has set a tentative trial date of September 18, 1967, on this indictment, judicially and finally determined as insufficient to support jurisdiction, and threatens to proceed to trial on that date, or thereafter at the convenience of the Court.

7. Section 3731 of Title 18, U.S.C., provides as follows:

"An appeal may be taken by and on behalf of the United States from the District Courts to a court of appeals in all criminal cases in the following instances: • • • •

"from a decision or judgment setting aside or dismissing any indictment or information or any count throughout except for a direct appeal to the Supreme Court of the United States as provided by this section."

8. The government failed to take an appeal from Judge Igoe's order of August 25, 1965, dismissing the Petitioner, Joseph Glimco, of all the alleged violations under Title 29, Section 186(b) of the United States Code within the statutory time provided.

9. The government has by instituting these proceedings under so-called indictment 66 CR 365 returned by the December 1965 Grand Jury, sitting in the Northern District of Illinois, reindicted the Petitioner, Joseph Glimco, for the very same acts and alleged offenses

by using the exact language in the indictment, word for word, as was contained in the indictment dismissed by the trial court on August 25, 1965. There was no attempt made on the part of the government to correct the judicially determined insufficiencies of the original indictment, 64 CR 724, in any count applicable to Glimco.

10. To allow these proceedings to continue would amount to a redetermination of a prior judgment which was conclusive between the parties as to matters litigated and determined by the order handed down by Judge Michael L. Igoe, dismissing the indictment, 64 CR 724, on August 25, 1965.

11. The sections of the United States Code involved here are the laws of the United States and, as such, bind the *nisi prius* judges in the conduct of criminal trials in the courts of the United States. This court, sitting as a court of supervisory jurisdiction over the actions of the District Courts of the United States, has authority to issue Writs of Mandamus and Prohibition to insure the proper application of the laws of the United States. See *Howes Leather Co.* v. *La Buy,* 226 F.2d 703, 608 (C.A. 7, 1955), Aff'd., *La Buy* v. *Howes Leather Co.,* 352 U.S. 249; *United States* v. *Smith,* 331 U.S. 469. As this case presents the validity and binding effect of the final order issued by Judge Igoe and the government's failure to appeal, it is an extraordinary case in that the government has reindicted in identical form and language and has caused the District Judge, The Honorable James B. Parsons, to in effect sit in review upon the decision of Judge Igoe, which only this Court had power and authority to do, had a timely appeal been sought. The cause requires the issuance of the Writ sought "in aid of appellate jurisdiction which might otherwise be denied

by the unauthorized action" of the lower court. The Court below has assumed power which has not been conferred upon the District Court. *Ex Parte United States,* 287 U.S. 241, 246.

12. The action here threatened goes beyond the constitutional prohibition against double jeopardy. It is, in fact, a threat to proceed where jurisdiction has already been determined not to exist because of an invalid indictment. In criminal causes the only basis for assuming jurisdiction is an indictment charging a violation of the statutes of the United States as enacted by Congress and a final judicial determination has been entered that the allegations of this indictment do not comport with the statutory mandate and, therefore, jurisdiction does not exist.

Wherefore, the Petitioner prays that this Court issue a Writ of Prohibition directing the Respondent to honor the prior order and proceed no further in the trial of the criminal cause against this Petitioner, wherein it has been finally adjudicated the identical indictment was insufficient to confer jurisdiction and to grant such other and further relief which this Honorable Court shall deem fit and proper.

Joseph Glimco, Petitioner,
By /s/ Edward J. Calihan, Jr.
Edward J. Calihan, Jr.
His Attorney

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH PAUL GLIMCO, Defendant.	No. 66 CR 365

MOTION TO DISMISS THE INDICTMENT

Now comes the Defendant, Joseph Paul Glimco, by his attorney, Edward J. Calihan, Jr.; and respectfully moves this Honorable Court to dismiss the indictment herein.

There is attached hereto a memorandum and exhibits in support of the defendant's motion to dismiss.

Respectfully submitted,

Joseph Paul Glimco
By /s/ Edward J. Calihan, Jr.
Edward J. Calihan, Jr.
His Attorney

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH PAUL GLIMCO, Defendant.	}	No. 66 CR 365

MEMORANDUM AND EXHIBITS IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT

The Defendant, Joseph Paul Glimco, was first indicted by the October, 1964, Grand Jury sitting in the Northern District of Illinois, in indictment No. 64 CR 724. The cause was assigned to Judge Michael L. Igoe of this court. The charge alleged the accepting of gifts from employers in violation of Title 29, Section 186(b) of the United States Code. The indictment contained seventeen (17) counts, eleven (11) of these counts were against the defendant, Joseph Paul Glimco, and the balance were charges against Frank Pesce and Don Ross. A Motion to Dismiss this indictment was made by this defendant and his co-defendants and on August 25, 1965, Judge Igoe dismissed the indictment.

Just short of one year later on June 1, 1966, the Grand Jury returned the present indictment No. 66 CR 365. This indictment charged the defendant, Joseph Paul Glimco in four (4) counts, counts 4, 5, 6, and 8. It appears that some counts against Glimco were dropped because of the running of the statute of limitations. He is only charged in Counts 4, 5, 6, and 8. In the first indictment these were Counts 4, 5, 14, and 16. He is the sole defendant in these counts.

The said four (4) counts again allege the acceptance of gifts from employers in violation of Title 29, Section 186(b) of the United States Code. The present indictment 66 CR 365 by its *form and content* under Counts 4, 5, 6, and 8, have the precise language and are based upon the same events and incidents as the previous indictment, 64 CR 724. There is attached hereto Exhibits A, B, C, and D, which respectively set forth in red and black print the language of the indictment No. 64 CR 724 and indictment No. 66 CR 365. *The language is identical.* In each of those four (4) counts paragraph one states that paragraphs one through eight inclusive of Count I of the indictment are realleged. A perusal of count one of each of the two indictments indicates that paragraphs one through eight are also identical. They are merely descriptive. The first eight paragraphs of 64 CR 724 are attached hereto as Exhibit E.

Attached hereto as Exhibit F is the Motion to Dismiss which was filed in 64 CR 724. This Exhibit is incorporated in the present motion as though fully set forth and the grounds contained therein are alleged again as a basis for the dismissal of the present indictment 66 CR 365.

The Motion to Dismiss the first indictment 64 CR 724 was heard by the Honorable Judge Michael L. Igoe, (Exhibit F). At that time the motion was sustained as to the defendants herein. The plaintiff, United States of America, has now re-indicted defendant Joseph Paul Glimco for the same offenses previously charged and subsequently dismissed. It is extremely important for this court to closely compare the wording in both indictments to determine that they are identical in each of these four counts.

ARGUMENT

It is the defendant, Joseph Paul Glimco's respectful submission that the Motion to Dismiss which is incorporated as though fully set forth was sustained by Judge Igoe on counts which are *identical* to the counts now alleged in this indictment.

The issue now before this Honorable Court is as follows:

I.

WHETHER THE UNITED STATES IS ESTOPPED IN THIS CASE FROM RELITIGATING THESE COUNTS

The order entered by Judge Michael L. Igoe in the matter, 64 CR 724, which dismissed the indictment against Joseph Paul Glimco for alleged violations of Title 29, Section 186(b) of the United States Code was a *final order* of a District Court Judge in the aforesaid matter.

Upon receiving this order the available remedy open to the United States Government was to institute an Appeal under Title 18, Section 3731 of the United States Code:

> "An appeal may be taken by and on behalf of the United States from the District Courts to a Court of Appeals in all criminal cases in the following instances:
>
> • • • •
>
> "From a decision or judgment setting aside or dismissing any indictment or information or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

The Government has failed to take an appeal from Judge Igoe's order of August 25, 1965, dismissing the de-

fendant, Joseph Paul Glimco, of all alleged violations under Title 29, Section 186(b) of the United States Code within the statutory time provided.

If an indictment is dismissed "for any error, defect, or irregularity with respect to the grand jury," or the "indictment is found otherwise defective or insufficient for any cause," the government may have an opportunity to reindict. (§3289, Title 18, United States Code) That statute however, concerns itself with the statute of limitations, and inherent in this section is a recognition by the Government that the defect is apparent and has been corrected in the new indictment. Not here however. The language is identical. So far as Glimco is concerned in that he is only named alone in Counts 4, 5, 6, and 8, the indictments are identical.

The Government has, by instituting these proceedings under the so-called indictment 66 CR 365, returned by the December, 1965, Grand Jury, sitting in the Northern District, attempted to reindict the defendant, Joseph Paul Glimco, for the very same acts and alleged offenses by using the exact same language in the indictment, word for word, as the Honorable Judge Igoe dismissed on August 25, 1965. There was no attempt made on the part of the government to clarify or correct any deficiency prevailing in the original indictment 64 CR 724, in any count applicable to Glimco.

To allow these proceedings to continue would amount to a redetermination of a prior judgment which was conclusive between the parties as to the matters litigated and determined by the order handed down by Judge Michael L. Igoe dismissing indictment 64 CR 724 on August 25, 1965.

We contend that the United States Government is bound by the decision of Judge Igoe and that they are "Collaterally Estopped" from proceeding any further in this matter.

In *Frank* v. *Mangum,* 237 U.S. 390, 333, 334, 35 S. Ct., 582, 590, 59 L.Ed., 969 the Supreme Court, after citing *Southern Pacific Railroad Co.* v. *United States,* 168 U.S. 1, 48, 18 S. Ct. 18, 42 L.Ed. 355, in support of the fundamental principle that "a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties," and said that "the principle is as applicable to decisions of the criminal courts as to those of civil jurisdiction." And, again, in *United States* v. *Oppenheimer,* 242 U.S. 85, 87, 88, 37 S. Ct. 68, 69, 61 L.Ed. 161, 3 L.R.A., 516, the Supreme Court quoted with approval from the case of *The Queen* v. *Miles,* 24 QB. D. 423, 431, concerning finality of "the matter so adjudicated upon, i.e. 'criminal court', Hawkins J., having there said that 'in this respect the criminal law is in unison with that which prevails in civil proceeding.' The conclusiveness of a fact which has been competently adjudicated by a criminal trial is not confined to such matter as is sufficient to support a plea of double jeopardy. Even though there has been no former acquittal of a particular offense on trial, a prior judgment of acquittal on related matters has been said to be conclusive as to all that the judgment determined. The matter is one of "Collateral Estoppel" of the prosecutor. It is a rule which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon previous hearing.

In *Cosgrove* v. *United States,* 224 F. 2d 146, the defendants were convicted of, respectively, wilfully aiding

and assisting in and procuring, counseling and advising preparation and presentation of false and fraudulent estate tax returns and of providing an opportunity for defrauding the United States of penalties and interest on such returns. The court said in *Cosgrove* at page 150:

> "The distinction between a plea of former jeopardy and the principle of res judicata should be carefully observed as appellee correctly points out, former jeopardy involves an identity of offenses while in "collateral estoppel" one of the "components" of res judicata, a prior judgment "in conclusive between the parties * * * only as to matters actually litigated and determined by the judgment."

This principle was also applied by the Supreme Court in the case *United States* v. *Adams,* 281 U.S. 202, 205, and the court there said:

> "But although not technically a former acquittal, the judgment was conclusive upon all that was decided."

The United States Court of Appeals for the District of Columbia squarely stated in *Laughlin* v. *United States,* 344 F. 2d 187 at page 189:

> "The doctrine of collateral estoppel, developed largely in the context of civil litigation, is designed to prevent repetitious litigation of the same issue by the same parties. It applies generally to preclude relitigation of an issue resolved by final judgment in a prior legal action. While some of the policies underlying the application of the doctrine may be different, it is well established that the principles of collateral estoppel apply in criminal as well as in civil, litigation. This much is not controverted." *Laughlin* v. *United States,* C.A.D.C., 344 F. 2d 187, 189-190.

In the case at bar after the determination by Judge Igoe that the indictment should be dismissed, the proceed-

ings were terminated and the Government then had a right to appeal. On this appeal the findings of the trial court would have been subject to review. This was not a situation where the Government was to be bound by an order not subject to review. They did not correct any error or defect or irregularity in the indictment. The indictment is identical. What they are seeking here is to have this court review the decision of Judge Igoe. The Government should be collaterally estopped under the circumstances.

II.

THAT A JUDGE OF THE DISTRICT COURT IS BARRED FROM HEARING A MATTER OF LAW OR FACT PREVIOUSLY DETERMINED BY ANOTHER JUDGE OF THE SAME DISTRICT COURT.

When one court has fully considered and decided a matter the orderly administration of justice requires that it should be followed until reviewed.

In *Appleton* v. *Smith*, 1 F. Cas. 1075, Judge Miller, sitting as a Circuit Justice in the District of Arkansas in 1870 stated:

> "It would be in the highest degree indelicate for one judge of the same court thus to review and set aside the action of his associate in his absence, and might lead to unseemly struggles to obtain a hearing before one judge in preference to the other."

The case of *Reynolds* v. *Iron Silver Mining Co.*, 33 F. 354, Judge Brewer sitting in the Circuit Court of Colorado in 1888, concurred with Judge Miller's decision in the *Appleton* case.

Judge Rogers, sitting in the Eighth Circuit in the case of *Commercial Union of America Inc.* v. *Anglo-South*

Bank Ltd., 1925, 10 F. 2d 937, set forth in great detail the rulings of Federal Courts on the effect of a decision made by a trial judge upon the right of a judge sitting subsequently in the same court and same case, to overrule the ruling made by the prior judge on the same matters of law and fact. Judge Rogers felt strongly that to allow one judge to overrule previous decisions in the same court, once determined between the same parties, would destroy the orderly and dignified procedure of litigating matters before the court.

In *United States* v. *Selph*, 1948, 82 F. Supp. 56, there was an indictment returned and a demurrer filed to each of the seven counts. On September 24, 1948, Judge Hall treated the demurrer as a Motion to Dismiss under Rule 12(a), Federal Rules of Criminal Procedure, Title 18, United States Code, and denied it. The trial judge, Yankwich, acceded to further hearing on the indictment's sufficiency. At this time the Judge said:

> "So doing, I stated to counsel that I considered the proceeding in the nature of a 'voluntary pretrial,' aiming to discuss more fully a question of law, and that I was not treating the argument as a motion for rehearing. For while conceding that a judge who determined a matter may entertain a rehearing of it, I know of no precedent which would allow one judge in a criminal case to rehear a matter determined by another, except when the same legal question should arise, at a subsequent stage of the proceedings, either on the admissibility of testimony, or on a motion to acquit made at conclusion of the Government's case, and grounded on the insufficiency of evidence."

The case of *United States* v. *Wheeler*, 1958, 3 Cir., 256 F. 2d, 745, followed the rulings of the previous cases, that judges should not, if possible, place themselves in a position whereby in rendering impartial judgment they

might be required to overrule a decision of a judge of the same court in the same case. The judge who had denied a motion for suppression of evidence had assigned the disposition of the petition for rehearing of such motion to another judge because he was involved in two other lengthy trials and could not handle the petition. Here it was determined proper exercise of discretion for other judges to take new testimony, but where the new testimony proved to be substantially the same as at the original hearing, making of a decision on such testimony was in effect a review of the first Judge's earlier decision and was an abuse of discretion.

The case of *United States* v. *Mathies,* 1965, 3 Cir. 350 F. 2d 964, considers the problem of a dismissal of an indictment and a subsequent reindictment of the defendant. The defendant raised the issue that when the court upheld the subsequent indictment it was contrary to the action of the first judge's order dismissing the first indictment. The court stated:

> "It is to be noted, however, that the indictment which Judge Miller sustained was not the same indictment which had been dismissed by Judge Willson nor was it *identical* in its charging language." (Emphasis supplied)

Judge Kirkpatrick, felt that the rule that one judge of the same court should not overrule another judge's previous decisions in the same case did not apply because the indictments were completely different from one another. It goes without saying that if the second indictment had been identical in the charging language, the judge's decision would have been otherwise. The judge would have been obligated and bound by the scope of jurisdiction not to review but to accept the rule of law made by a court

of equal jurisdiction and to dismiss the subsequent indictment.

This is precisely the problem which has now been raised in the bringing of the indictment 66 CR 365. The language of this indictment of the defendant, Joseph Paul Glimco, in its charging part, is identical, therefore the rule that bars a judge from rehearing this matter does apply and is binding.

Any further consideration of the indictment 66 CR 365 before a judge of the District Court would be a total disregard by that judge of judicial precedent and a flagrant abuse of his power to exercise judicial discretion, which amounts to an attempt to overrule a prior judgment of a judge sitting in the same court and considering by its identical charging language, the same law and fact determined by the Honorable Judge Michael L. Igoe in his order dated August 25, 1965, in the matter of the indictment of the Defendant, Joseph Paul Glimco, in 64 CR 724.

WHEREFORE, for the above and foregoing reasons, it is respectfully submitted that counts 4, 5, 6, and 8 should be dismissed.

Respectfully submitted

JOSEPH PAUL GLIMCO,
Defendant

By: /s/ Edward J. Calihan, Jr.
EDWARD J. CALIHAN, JR.
HIS ATTORNEY

66 CR 365—Roman type represents black typewritten matter
64 CR 724—Italic type represents red typewritten matter

EXHIBIT A

COUNT FOUR
COUNT FOUR

The DECEMBER 1965, GRAND JURY further charges:
The OCTOBER, 1964 GRAND JURY further charges:

1. Paragraphs 1 through 8 inclusive of Count One of
1. Paragraphs 1 through 8, both inclusive, of Count

the Indictment, are realleged herein.
One of this Indictment, are hereby realleged and incorporated herein as though set forth in full.

2. On or about December 18, 1961, at Chicago, Illinois,
2. On or about December 18, 1961, at Chicago, Illinois,

in the Northern District of Illinois, Eastern Division,
in the Northern District of Illinois, Eastern Division,

JOSEPH PAUL GLIMCO,
JOSEPH PAUL GLIMCO,

defendant herein, did unlawfully, wilfully and knowingly
defendant herein, did unlawfully, wilfully and knowingly

receive and accept, and agree to receive and accept a
receive and accept, and agree to receive and accept a

thing of value, to wit: a 1962 XK-E Jaguar automobile,
thing of value, to wit: a 1962 XK-E Jaguar automobile,

from Frank Pesce and Don Ross, who were employers
from Frank Pesce and Don Ross, who were employers

and acting in the interest of the aforesaid employers, at a
and acting in the interest of the aforesaid employers, at a

time when said Joseph Paul Glimco was an officer and
time when said Joseph Paul Glimco was an officer and

employee, to wit: President of Local 777, a labor organiza-
employee, to wit: President of Local 777, a labor organiza-

tion which did seek to represent and would admit to mem-
tion which did seek to represent and would admit to mem-

bership employees of said employer who were engaged
bership employees of said employer who were engaged

in an industry affecting commerce;
in an industry affecting commerce;

In violation of Section 186(b), Title 29, United States
In violation of Section 186(b), Title 29, United States

Code.
Code.

EXHIBIT B

COUNT FIVE
COUNT FIVE

The DECEMBER 1965, GRAND JURY further charges:
The OCTOBER, 1964 GRAND JURY further charges:

1. Paragraphs 1 through 8 inclusive of Count One of
1. Paragraphs 1 through 8, both inclusive, of Count

this Indictment are realleged herein.
One of this Indictment, are hereby realleged and incorporated herein, as though set forth in full.

2. On or about December 18, 1961, at Chicago, Illinois,
2. On or about December 18, 1961, at Chicago, Illinois,

in the Northern District of Illinois, Eastern Division,
in the Northern District of Illinois, Eastern Division,

JOSEPH PAUL GLIMCO,
JOSEPH PAUL GLIMCO,

defendant herein, did unlawfully, wilfully and knowingly
defendant herein, did unlawfully, wilfully and knowingly

receive and accept, and agree to receive and accept a
receive and accept, and agree to receive and accept a

thing of value, to wit: a 1962 XK-E Jaguar automobile
thing of value, to wit: a 1962 XK-E Jaguar automobile

from Frank Pesce and Don Ross, who were employers
from Frank Pesce and Don Ross, who were employers

and acting in the interest of the aforesaid employers;
and acting in the interest of an employer;

which thing of value was delivered, and caused to be
which thing of value was delivered, and caused to be

delivered, to said Joseph Paul Glimco, at a time when he
delivered, to said Joseph Paul Glimco, at a time when he

was an officer and employee, to wit: President of Local
was an officer and employee, to wit: President of Local

777, a labor organization engaged in an industry affecting
777, a labor organization engaged in an industry affecting

commerce, and which was delivered and caused to be
commerce, and which was delivered and caused to be

delivered, with intent to influence the actions, decisions
delivered, with intent to influence the actions, decisions

and duties of said defendant as such officer and employee
and duties of said defendant as such officer and employee

of such labor organization;
of such labor organization;

In violation of Section 186(b), Title 29, United States
In violation of Section 186(b), Title 29, United States

Code.
Code.

EXHIBIT C

COUNT SIX
COUNT FOURTEEN

The DECEMBER, 1965 GRAND JURY further charges:
The OCTOBER, 1964 GRAND JURY further charges:

1. Paragraphs 1, 6 and 7 of Count One of this Indictment are realleged herein.

2. In or about December, 1961, at Chicago, Illinois, in
2. In or about December, 1961, at Chicago, Illinois, in

the Northern District of Illinois, Eastern Division,
the Northern District of Illinois, Eastern Division,

JOSEPH PAUL GLIMCO,
JOSEPH PAUL GLIMCO,

defendant herein, did unlawfully, wilfully and knowingly
defendant herein, did unlawfully, wilfully and knowingly

receive and accept a thing of value, to wit: turkeys, from
receive and accept a thing of value, to wit: turkeys, from

Frank Pesce, an employer within the definition of Section
Frank Pesce, an employer within the definition of Section

152(2), Title 29, United States Code, and a person acting
152(2), Title 29, United States Code, and a person acting

in the interest of an employer, which thing of value was
in the interest of an employer, which thing of value was

delivered, and caused to be delivered, to said Joseph Paul
delivered, and caused to be delivered, to said Joseph Paul

Glimco at a time when he was an officer and employee
Glimco at a time when he was an officer and employee

of Taxicab Drivers Local 777, International Brotherhood
of Taxicab Drivers Local 777, International Brotherhood

of Teamsters, Chauffeurs, Warehousemen and Helpers of
of Teamsters, Chauffeurs, Warehousemen and Helpers of

America, a labor organization engaged in an industry
America, a labor organization engaged in an industry

affecting commerce, and which was delivered and caused
affecting commerce, and which was delivered and caused

to be delivered, with intent to influence the actions,
to be delivered, with intent to influence the actions,

decisions and duties of said defendant as such officer and
decisions and duties of said defendant as such officer and

employee of such labor organization.
employee of such labor organization.

In violation of Section 186(b), Title 29, United States
In violation of Section 186(b), Title 29, United States

Code.
Code.

EXHIBIT D

COUNT EIGHT
COUNT SIXTEEN

The DECEMBER 1965, GRAND JURY further charges:
The OCTOBER, 1964 GRAND JURY further charges:

1. Paragraphs 1, 6 and 7 of Count One of this Indictment are realleged herein.

2. On or about May 17, 1962, at Chicago, Illinois, in
2. On or about May 17, 1962, at Chicago, Illinois, in

the Northern District of Illinois, Eastern Division,
the Northern District of Illinois, Eastern Division,

JOSEPH PAUL GLIMCO,
JOSEPH PAUL GLIMCO,

defendant herein, did unlawfully, wilfully and knowingly
defendant herein, did unlawfully, wilfully and knowingly

receive and accept a thing of value, to wit: services upon
receive and accept a thing of value, to wit: services upon

a home sprinkler system, from Frank Pesce, an employer
a home sprinkler system, from Frank Pesce, an employer

within the definition of Section 152(2), Title 29, United
within the definition of Section 152(2), Title 29, United

States Code, and a person acting in the interest of an
States Code, and a person acting in the interest of an

employer; which thing of value was delivered, and caused
employer; which thing of value was delivered, and caused

to be delivered, to said Joseph Paul Glimco at a time
to be delivered, to said Joseph Paul Glimco at a time

when he was an officer and employee of Taxicab Drivers
when he was an officer and employee of Taxicab Drivers

Local 777, International Brotherhood of Teamsters,
Local 777, International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America, a
Chauffeurs, Warehousemen and Helpers of America, a

labor organization engaged in an industry affecting
labor organization engaged in an industry affecting

commerce and which was delivered, and caused to be
commerce and which was delivered, and caused to be

delivered, with intent to influence the actions, decisions
delivered, with intent to influence the actions, decisions

and duties of such defendant as such officer and employee
and duties of such defendant as such officer and employee

of such labor organization;
of such labor organization;

In violation of Section 186(b), Title 29, United States
In violation of Section 186(b), Title 29, United States

Code.
Code.

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)
)
v.) No. 64 CR 724
)
JOSEPH PAUL GLIMCO,)
FRANK PESCE and)
DON ROSS)

Vios.: Title 18, United States Code, Sections 2 and 371; Title 29, United States Code, Section 186.

COUNT ONE

The OCTOBER, 1964 GRAND JURY charges:

1. At all times pertinent hereto, Taxicab Drivers Local No. 777, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereinafter referred to as "Local 777"), was a labor organization engaged in an industry affecting commerce, and Joseph Paul Glimco was an officer and employee of such labor organization.

2. At all times pertinent hereto, Mid States Jaguar, Lt'd., (hereinafter referred to as "Mid States"), maintained an office in Chicago, Illinois, and was engaged in the business of selling new and used foreign automobiles manufactured and shipped from outside the State of Illinois.

3. At all times pertinent hereto, Mid West Triumph Distributors, Inc. (hereinafter referred to as "Mid West"),

maintained an office in Chicago, Illinois, and was engaged in the business of selling new and used foreign automobiles manufactured and shipped from outside the State of Illinois.

4. At all such times, both Mid West and Mid States employed workmen for the purpose of selling and servicing said foreign automobiles, and both were thereby employers within the definition of Section 152(2), Title 29, United States Code; and the employees of said Mid West and Mid States were thereby employed in an industry affecting commerce.

5. At all such times, Don Ross was an officer and agent of Mid West and Mid States and an employer within the definition of Section 152(2), Title 29, United States Code.

6. At all times pertinent hereto, Best Sanitation and Supply Co. (hereinafter referred to as "Best") maintained an office in Chicago, Illinois, and Frank Pesce was the owner of said Best.

7. At all such times, said Frank Pesce did employ workmen to perform services for said Best, and was thereby an employer within the definition of Section 152(2), Title 29, United States Code.

8. At all such times, Local 777, sought to represent, and would admit to membership, employees of Mid West and Mid States who were employed in an industry affecting commerce.

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	No. 64 CR 724
	)	
JOSEPH PAUL GLIMCO, FRANK PESCE and DON ROSS	)	

MOTION TO DISMISS THE INDICTMENT

Now comes JOSEPH PAUL GLIMCO, one of the defendants herein, by his attorney, EDWARD J. CALIHAN, JR., and moves the Court to dismiss the indictment herein for the following reasons:

1. The said indictment, and each count thereof, fails to inform this defendant of the nature and cause of the accusation with the certainty required by law.

2. The said indictment, and each count thereof, fails to aver or charge the commission of acts by this defendant, constituting any offenses against any statute of the United States with the certainty required by law.

3. The said indictment, and each count thereof, is vague, indefinite and uncertain, and therefore insufficient, for that the said indictment, or any count thereof, does not sufficiently aver or charge the elements of the alleged crimes or offenses therein attempted to be charged, and it is impossible for this defendant to prepare a defense thereto.

4. The allegations of the indictment, and each count thereof, are so uncertain and indefinite that they violate

the requirements of the Sixth Amendment to the Constitution of the United States.

5. The said indictment, and each count thereof, is void, for failure to allege facts to show that Mid States, Mid West and Best were parties or persons whose conduct is proscribed by Sections 186(a) and 186(b) of Title 29, United States Code, within the definition of Section 152(2), Title 29, United States Code.

6. The said indictment, and each count thereof, is void, for failure to allege that this defendant was aware of the proscriptions of Section 186, or to allege that this defendant recklessly disregarded said section.

7. The said indictment, and each count thereof, is void, for failure to allege that Mid States, Mid West and Best had within their employ, at the times stated in the indictment, wherein it is alleged that a thing of value was paid or delivered by them to certain representatives of labor organizations, members of the said Local Union 777 named in each count.

8. At paragraphs 6 and 7, the indictment alleges that Best Sanitation and Supply Company maintained an office in Chicago and the defendant, Pesce, was the owner of Best. The indictment also alleges that Pesce employed workmen to perform services for Best and was thereby an employer within the definition of 152(2), Title 29, United States Code. There is absolutely no pleading by the plaintiff herein that Pesce or Best Sanitation was an industry affecting commerce or that its employees were employed in an industry affecting commerce. The indictment is fatally defective and each count which depends upon transactions with either Best or Frank Pesce are defective and should be dismissed. These are counts 1, 10, 11, 12, 13, 14, 15, 16 and 17.

9. Counts 6 and 8 should be dismissed for failing to state an offense within the meaning of the statute. At both counts 6 and 8 the defendant, Joseph Glimco, is charged with being a "*member* of Joint Council 25, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Helpers and was a representative of employees of said employer who were employed in an industry affecting commerce." These two counts are bottomed on a violation of 186(b) of Title 29, United States Code which makes it unlawful for a person to accept money or a thing of value prohibited by subsection (a). Subsection (a) of Section 186, Title 29, United States Code makes it unlawful for an employer to pay money or a thing of value to:

> "(1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> "(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> "(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> "(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization."

Nowhere in the Act is a *"member"* of a union proscribed from receiving money or a thing of value.

10. Counts 6, 7, 8 and 9 relate to offenses charged between Glimco and one Ben R. Stein. In Case No. 64 CR 485, entitled *United States of America* v. *Ben R. Stein and Louis Novinson,* pending in the United States District Court for the Northern District of Illinois, Eastern Division, the subject matter of the 4 counts in that case are a portable television set and a 21-inch color television set. These are also the subject-matters of Counts 6, 7, 8 and 9 of the indictment in this case. Indictment No. 64 CR 485 charges Stein with the offense of giving these two television sets to Joseph Paul Glimco. Nowhere in that indictment is Glimco charged with any offense. In the instant indictment the basic charge is contained in count 1, which alleges a conspiracy between Joseph Paul Glimco, Frank Pesce and Don Ross. The inclusion of four counts charging Glimco with receiving the two television sets from Ben R. Stein is an improper joinder of offenses. If it were intended to charge Glimco with the receipt of these objects, it should properly belong in 64 CR 485. To include it in the indictment in the case at bar involving an alleged relationship between Glimco, Pesce and Ross, is to interpose another person not in any way alleged to be involved with Ross or Pesce. The defendant, Glimco, asks that the Court grant a severance of these counts from the indictment pursuant to Rule 14 of the Federal Rules of Criminal Procedure which grants relief from prejudicial joinder.

11. Counts 6, 7 and 8 and 9 state that the defendant, Glimco, received a thing of value, to wit, either a portable television set in Counts 6 and 7 or a 21-inch color television set in Counts 8 and 9 from one Ben R. Stein. The

indictment simply states: "From Ben R. Stein, an employer within the definition of 152(2), Title 29, United States Code." It is respectfully urged that this is the ultimate in pleading of conclusions. Nothing is stated as to the nature of the business, the business organization or any other identification. The indictment must be viewed within its four corners. Without the other indictment heretofore referred to in paragraph 10 hereof, or a reading thereof, it is impossible to determine from this indictment who or what "Ben R. Stein" is. The indictment is completely insufficient factually on these counts.

12. Counts 2 through 17 violate the Sixth Amendment to the Constitution of the United States in that they fail to advise the defendant of the nature and cause of the accusation against him as required by law. Section 186(b), as amended, makes it "unlawful for any person * * * accept * * * any money or other thing of value prohibited by subsection (a)". Subsection (a) encompasses six classes of persons and four different courses of illegal conduct. Therefore, the allegation in each of Counts 2 through 17 that the defendant, Glimco, accepted money in violation of subsection (b), which refers to section (a), which in turn described four different courses of conduct and six different classes of persons, does not inform the defendant with the specificity required by law of the crimes with which he is charged.

WHEREFORE, this defendant respectfully moves the Court to dismiss this indictment.

JOSEPH PAUL GLIMCO, Defendant
BY .....
EDWARD J. CALIHAN, JR.
His Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
-vs-	)	No. 64 CR 724
	)	
JOSEPH PAUL GLIMCO, et al.	)	

AMENDMENT TO MOTION TO DISMISS INDICTMENT

Now comes JOSEPH PAUL GLIMCO, one of the Defendants herein, by his attorney, EDWARD J. CALIHAN, JR., and, with leave of Court first had and obtained, amends the Motion to Dismiss the Indictment heretofore filed herein to include the following:

13. Count I of the indictment, the conspiracy charge, should be dismissed because the alleged agreement or conspiracy is to commit an offense against the United States which it is impossible to commit without cooperative action, and any agreement to commit such an offense is not an indictable conspiracy.

JOSEPH PAUL GLIMCO,
Defendant

BY: .....
EDWARD J. CALIHAN, JR.,
HIS ATTORNEY

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOSEPH GLIMCO,
Petitioner

v.

No. 16446

THE HONORABLE JAMES B. PARSONS,
United States District Judge of the
United States District Court for the
Northern District of Illinois,

Respondent

ANSWER TO PETITION FOR WRIT OF PROHIBITION
(Filed Sep 19 1967)

Edward V. Hanrahan, United States Attorney, on behalf of The Honorable James B. Parsons, United States District Judge of the United States District Court for the Northern District of Illinois, respondent, for answer to the petitioner's Petition for Writ of Prohibition, says as follows:

I.

The present application for a writ of prohibition is controlled by *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943). In *Roche* the defendants moved that the indictment be quashed for want of jurisdiction of the District Court, charging that the continued Grand Jury which returned the indictments had not begun its investigation of the defendants during the Jury's original term. The District Court denied the defendant's motion. Upon such denial an application was made for a writ of mandamus to the Court of Appeals. That Court, after an *en banc* hearing, awarded the writ, and directed the District Court to reinstate the defendants' motion and to hold a

hearing thereon. District Judge Roche filed his petition for certiorari in the Supreme Court, contending that the District Court's order denying the motion to quash was an exercise of its discretion, and that such action could only be reviewed by appeal and not by mandamus, and that by Congressional enactment and policy appellate review of final judgment of conviction and such legislation and policy were not to be circumvented by resort to mandamus.

The Supreme Court agreed with the contentions of Judge Roche, and in reversing the Court of Appeals' issuance of the writ, said as follows:

> "As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction. Its authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal. *Ex parte Bradstreet,* 7 Pet. 634; *Insurance Company* v. *Comstock,* 16 Wall. 258, 270; *McClellan* v. *Carland, supra,* 280; *Ex parte United States,* 287 U.S. 241, 246; cf. *Ex parte Siebold,* 100 U.S. 371, 374-5; *Ex parte Peru,* 318 U.S. 578, and cases cited.
>
> "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. *Ex parte Peru, supra,* p. 584, and cases cited; *Whitney* v. *Dick,* 202 U.S. 132, 136, 140. Hence the question presented on this record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case

was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute."

(pp. 25-26)

* * * * * *

"Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record. *Ex parte Morgan,* 114 U.S. 174, 175; *In re Atlantic City R. Co.,* 164 U.S. 633, 635; *Ex parte Roe,* 234 U.S. 70, 73; *Ex parte Park Square Automobile Station,* 244 U.S. 412, 414; *Ex parte Riddle,* 255 U.S. 450, 451. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U.S.C. § 225(a). Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congres-

sional policy against piecemeal appeals in criminal cases. *Cobbledick* v. *United States*, 309 U.S. 323."

(pp. 27, 28, 29, 30)

• • • • • • •

"For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. *Ex parte Hoard, supra; Ex parte Harding, supra; Ex parte Roe, supra; Ex parte Park Square Automobile Station, supra.* And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, *In re Atlantic City R. Co., supra; Ex parte Chicago, R.I. & P. Ry. Co.*, 255 U.S. 273, 280; cf. *In re New York & Puerto Rico S. S. Co.*, 155 U.S. 523, 531, or denying a nonsuit, *Ex parte Loring*, 94 U.S. 418, despite the inconvenience to petitioner of being forced to proceed to trial in advance of a review of the court's action. *Ex parte Whitney*, 13 Pet. 404, 408; *Ex parte Perry*, 102 U.S. 183, 186. Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct. Hence there are in this case no special circumstances which would justify the issuance of the writ, such as the persistent disregard of the Rules of Civil Procedure prescribed by this Court, found in *McCullough* v. *Cosgrave*, 309 U.S. 634 (see *Los Angeles Brush Co.* v. *James*, 272 U.S. 701, 706-8); or the refusal to perform a plain ministerial duty, involved in *Ex parte United States, supra;* or the considerations of comity between state and federal courts, thought to be controlling in *Maryland* v. *Soper (No. 1)*, 270 U.S. 9, 29."

(pp. 30-31)

Roche v. *Evaporated Milk Association*, 319 U.S. 21, 25-26, 27, 28, 29, 30, 31.

The petitioner relies on *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, and *United States* v. *Smith*, 331 U.S. 469. His reliance is misplaced. In Judge La Buy's case, the writ was awarded because it was held that Judge La Buy had made an improper reference to a master in violation of Rule 53 of the Rules of Civil Procedure, and in Judge Smith's case, the writ was awarded because of the grant of a new trial out of time under Rule 33 of the Federal Rules of Criminal Procedure. We have in both these cases a disregard of the Rules of Civil and Criminal Procedure proscribed by *Roche*.

In sum, therefore, the Petition at bar does not set forth any ground or claim calling for the exercise of supervisory jurisdiction. The overruling of a motion addressed to the jurisdiction of a district court does not constitute special circumstances which would justify the issuance of a Writ of Prohibition.

II.

The petitioner predicates his petition for issuance of a writ of prohibition on the ground of identity of charges. Thus in this Court he alleges:

> "4. • • • The present indictment, 66 CR 365, by its form and content under Counts Four, Five, Six and Eight, is in the precise language and is based on the same events and incidents as the previous indictment, 64 CR 724. No change whatsoever was made in these four counts which are the only counts charging the Petitioner with a violation of law."
> (Pet. paragraph 4, p. 3)[1]

[1] "Pet." refers to the Petition for Writ of Prohibition filed herein.

Further, in paragraph 9 of his petition (Pet. p. 6), petitioner alleges as follows:

> "9. The government has by instituting these proceedings under so-called indictment 66 CR 365 returned by the December 1965 Grand Jury, sitting in the Northern District of Illinois, reindicted the Petitioner, Joseph Glimco, for the very same acts and alleged offenses by using the exact language in the indictment, word for word, as was contained in the indictment dismissed by the trial court on August 25, 1965. There was no attempt made on the part of the government to correct the judicially determined insufficiencies of the original indictment, 64 CR 724, in any count applicable to Glimco."
>
> (Pet. paragraph 9, p. 6)

III.

The petitioner took an identical position as to identity of the indictments in his motion to dismiss the second indictment (Pet. Exhibit "A") before this respondent.

IV.

In this regard—identity of the charges in the first and second indictment—the defendant relies upon a mistaken assumption of fact. In the first count of the first indictment, paragraph six was incorporated by reference as a part of each succeeding count. Paragraph six of Count One, as it appeared in the first indictment, charged as follows:

> "6. At all times pertinent hereto, Best Sanitation and Supply Co. (hereinafter referred to as 'Best') maintained an office in Chicago, Illinois, and Frank Pesce was the owner of said Best."
>
> (Pet. Exhibit "E")

Before Judge Igoe, in moving to dismiss the first indictment, the petitioner took the position that the first indictment was fatally defective because paragraphs six and seven of Count One did not allege that Pesce or Best was an industry affecting commerce (Pet. Exhibit "F", paragraph 8), and for that reason all counts which involved Pesce or Best and Glimco should be dismissed. Further, petitioner alleged before Judge Igoe that the first indictment and each count thereof failed to aver or charge commission of any acts constituting an offense against the United States (Pet. Exhibit "F", paragraph 2).

V.

Section 186 of Title 29, United States Code, which is here involved, makes unlawful certain acts of employers in, among other things, giving money or anything of value to representatives of employees and to other enumerated persons who are engaged "in an industry affecting commerce." This phrase is repeated in subsections (a)(1), (a)(2), (a)(3), and (a)(4) of Section 186, Title 29, United States Code. The jurisdictional test under 29 U.S.C. 186(a) revolves about an industry affecting commerce. *United States* v. *Ricciardi,* 357 F.2d 91, 94 (2nd Cir. 1966), *cert. den.* 84 S.Ct. 1464.

VI.

In the second indictment,[2] paragraph 6 was changed to read as follows:

> "6. During all of the times herein mentioned, Best Sanitation and Supply Co. (hereinafter referred to as 'Best') maintained an office in Chicago, Illinois, and Frank Pesce was the owner thereof, *and said*

[2] The second indictment is transmitted herewith as Exhibit "A".

Best was engaged in an industry affecting commerce."

In the second indictment the above paragraph 6 of Count One is incorporated in each succeeding count, including those affecting the petitioner. The underlined language does not appear in the first indictment. (Pet. Exhibit "E", paragraph 6). The underlined language appears only in the second indictment.

VII.

Without determining the merits which are not and have not been before me, it thus appears that the government in its second indictment changed the form of the indictment to obviate what the petitioner thought to be a defect in the first indictment. If we assume such jurisdictional defect (and I make no such determination), then the second indictment must be attacked as to its own sufficiency. There is no identity. The basis of the instant petition is precise identity. Since such basis in fact does not exist, the petition does not state a claim upon which relief may be granted.

VIII.

The Court's attention is directed to the form of the motion to dismiss the first indictment (Pet. Exhibit "F"). It is this Respondent's submission that the motion is limited to the sufficiency of the indictment on its face, particularly with respect to the counts now complained of. There never was a hearing or a determination in the first indictment on the question of whether or not Best was engaged in an industry affecting commerce. Reindictment is not prohibited by the doctrine of collateral estoppel or res judicata—particularly where the second indictment obviates alleged jurisdictional difficulties. Cf.

Sealfon v. *United States,* 332 U.S. 575 (1948). The demands of public justice may not be defeated by correction of alleged pleading defects. The Government is entitled to an avoidance of miscarriage of justice. This is not the case as in *United States* v. *Oppenheimer,* 242 U.S. 85 (1916), where the single defect of a statute of limitations was involved, and where the Supreme Court held: "We do not suppose that a judgment upon a demurrer to the merits would be a *bar to a second indictment in the same words.*" (at page 87—emphasis added). We do not have a second indictment in the same words in the petition at bar.

IX.

The doctrine of the law of the case has never been viewed in this Court as a limitation upon jurisdiction. It is a doctrine predicated upon judicial comity. Judge Lindley several years ago refused to apply the doctrine of the law of the case where one district judge reversed the order of another district judge in the same case. He laid down the applicable rule as one not of limitation on the court's authority, but one to be used in discretion. *Bowles* v. *Wilke,* 175 F.2d 35, 37 (7th Cir. 1949).

X.

Both of the cases cited by petitioner in support of exercise of supervisory jurisdiction do not militate against the controlling authority of *Roche* v. *Evaporated Milk Association,* 319 U.S. 21 (1943). Judge La Buy's case is concerned with a referral of a civil case as to a master without meeting the requirements of Rule 53 of the Federal Rules of Civil Procedure, and Judge Smith's case concerns the *sua sponte* of an out of time grant of re-trial in violation of Rule 33 of the Federal Rules of Criminal Procedure.

Wherefore, it is respectfully submitted that the petition at bar be dismissed on the merits, or alternately denied as a matter of discretion.

Respectfully submitted,

/s/ Edward V. Hanrahan
Edward V. Hanrahan, United States Attorney, on behalf of The Honorable James B. Parsons, United States District Judge of the United States District Court for the Northern District Court of Illinois, Respondent.

JPL:ak

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 16446

JOSEPH GLIMCO,)
Petitioner,)
vs.)
THE HONORABLE JAMES B. PARSONS,)
United States District Judge of)
The United States District Court)
for the Northern District of)
Illinois,)
Respondent.)

REPLY TO GOVERNMENT'S ANSWER TO THE PETITION FOR WRIT OF PROHIBITION

(Filed Sep 21 1967)

Joseph Glimco, Petitioner, for reply to the Respondent's answer to the Petition for a Writ of Prohibition says as follows:

1. Your Petitioner respectfully represents that the present application for a writ of prohibition is *not* controlled by *Roche* v. *Evaporated Milk Association,* 319 U.S. 21 (1943), in that the Petitioner respectfully says that the case at bar does not represent a review of an exercise of the District Court's discretion. The case at bar does not involve a situation where an abuse of discretion should only be reviewed by appeal and not by mandamus. The Petition here clearly states that under the circumstances herein, first, the Government is collaterally estopped from proceeding, and, two, that the District Court has no jurisdiction to hear the cause. The Respondent argues that our reliance upon *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 and *United States*

v. *Smith,* 331 U.S. 469 is misplaced. These cases basically did not involve a discretionary act as was the case in *Roche v. Evaporated Milk Association,* 319 U.S. 21. As such, they do in fact support Petitioner's position that the trial court is acting beyond the scope of his authority.

2. The Respondent at his paragraph numbers II, III and IV makes an argument that the changes are not in fact identical and that the Petitioner took this position in his motion to dismiss the second indictment. It is further argued that in regard to the identity of the charges in the first and second indictment that the Petitioner relies upon a mistake in assumption of fact. Apparently, counsel for the Respondent has not taken the trouble to read the Petitioner's argument below. The only counts that were involved in both cases are Counts 4, 5, 6 and 8. The incorporation of certain allegations of Count One, that is to say, paragraphs 1 through 8 of Count One, are merely "descriptio personae" of the parties involved in the alleged conspiracy. The Respondent would have this court believe that merely because Best was not alleged to be in an industry affecting commerce in the description portion of the first count (in which Glimco is not now charged), that Judge Igoe dismissed the entire indictment.

If anyone has made a mistake in assumption of facts, it is the Respondent. The complaint made as to Count One was really that Glimco could not be charged in that count together with co-defendants Ross and Pesce with conspiring to bribe himself. Any change in an allegation affecting Pesce or Best could have absolutely no materiality as the jurisdictional allegation is contained in the charging portion of each count. Count 4 in both the old and new indictment charges as follows:

"Glimco . . . did . . . receive . . . a thing of value . . . from Frank Pesce and Don Ross who were employers and acting in the interest of the aforesaid employers at a time when said Joseph Paul Glimco was an officer and employee, to wit: President of Local 777, a labor organization which did seek to represent and would admit to membership employees of said employer who were engaged in an industry affecting commerce."

Count 5 in both the old and new indictments charged the same thing of value but alleged that the commerce feature of it rested on the labor organization in the following words:

". . . at a time when he was an officer and employee to wit: President of Local 777, a labor organization engaged in an industry affecting commerce."

Count 6 of the new indictment and Count 14 of the old indictment and Count 8 of the new indictment and Count 16 of the old indictment again bottom the jurisdiction on the fact that Local 777 was a labor organization engaged in an industry affecting commerce.

3. The Government in its second indictment did not change the form of the indictment as to the four counts. The allegations are identical; in the incorporated paragraphs the additional description did not change the basic allegation of jurisdiction in the charge. Judge Igoe did not dismiss the indictment for failure to allege jurisdiction. The second indictment does not, as Respondent says, obviate alleged jurisdictional difficulty. One only has to read the charging portions of the counts to determine that if Pesce was an employer within the meaning of the act, jurisdiction was properly pleaded.

In the Respondent's citation of *United States* v. *Oppenheimer,* 242 U.S. 85, the answer purports to quote the words of Mr. Justice Holmes:

> "We do not suppose that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words".

Your Petitioner is somewhat amazed at this. The exact quotation is as follows:

> "We do not suppose *that it would be doubted* that a judgment upon a demurrer to the merits would be a bar to a second indictment in the same words." (Emphasis supplied.)

Such an omission in the Government's brief is unfortunate. Perhaps it can be blamed upon copy failure. Counsel for your Petitioner sincerely hopes this is the case.

More importantly, however, this Court's attention is respectfully directed to the following sentence in the same opinion:

> "Of course, the quashing of a bad indictment is no bar to a prosecution upon a good one, but a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law, and one judgment that he is free as a matter of substantive law is as good as another."

The Court again goes on to state:

> "Where a criminal charge has been adjudicated upon by a court having jurisdiction to herein determine it, the adjudication, whether it takes the form of an acquittal or conviction, is as final as to the matter so adjudicated upon, and may be pleaded *in bar* to any subsequent prosecution for the same offense." (Emphasis added.)

The Petitioner submits that the dismissal was urged in the first instance on multiple grounds. Unfortunately, Judge Igoe did not write a formal opinion. The Government had the option to appeal Judge Igoe's dismissal or, in the alternative, to return a good indictment based upon proper pleading. That remedy is still available to them. If this Court should find that the *Oppenheimer* case controls here, there is nothing to prevent the United States Attorney from proceeding on a new and proper indictment. We suggest to the Court that as a matter of law the adjudication by Judge Igoe on this form of indictment is final and may be pleaded in bar to a prosecution for the identical charging language.

WHEREFORE, it is respectfully submitted that the Petition for Writ of Prohibition filed herein be granted.

JOSEPH PAUL GLIMCO, Petitioner,
By Edward J. Calihan, Jr.,
EDWARD J. CALIHAN, JR.,
His Attorney

RECEIVED a copy of the foregoing Reply this 21st day of September, 1967.

EDWARD V. HANRAHAN,
United States Attorney,
By.....

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, September 22, 1967

Before
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

JOSEPH GLIMCO,
Petitioner,
vs.
No. 16446
THE HONORABLE JAMES B. PARSONS,
United States District Judge,
Respondent.

Original Petition for Writ of Prohibition

This matter comes before the Court on the petition of counsel for Joseph Glimco filed herein on September 8, 1967, for a writ of prohibition directed to respondent to honor the order entered by the Honorable Michael Igoe on August 25, 1965, in cause No. 64-CR-724 in the United States District Court for the Northern District of Illinois, Eastern Division, and to proceed no further in the trial of the criminal cause against this petitioner, being in cause No. 66-CR-365, and for other relief; the answer of counsel for respondent to said petition for writ of prohibition and the reply of petitioner to Government's answer.

On consideration whereof, It Is Ordered that the said petition for writ of prohibition be, and the same is hereby Denied.

It Is Further Ordered that that part of this Court's order heretofore entered in this matter on September 11, 1967 which stayed further proceedings herein in the United States District Court be vacated and set aside.

A True Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 746

JOSEPH P. GLIMCO, PETITIONER

v.

THE HONORABLE JAMES B. PARSONS, UNITED STATES DISTRICT COURT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 50a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1967. The petition for a writ of certiorari was filed on October 20, 1967. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's application for a writ of prohibition to compel dismissal of an indictment was properly denied.

STATUTE INVOLVED

Sections 186(a) and (b)(1) of Title 29 U.S.C. provide:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence

any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

STATEMENT

Petitioner was originally indicted in the Northern District of Illinois on December 17, 1964. The indictment, which also named other defendants, contained seventeen counts, eleven of which charged petitioner with conspiracy (count 1) and with violations of 29 U.S.C. 186(b) in that on various occasions he, being a representative of employees, accepted gifts from Frank Pesce and Don Ross, two employers.

Petitioner filed a motion to dismiss the original indictment (Pet. 29a-34a), alleging, among other grounds, that as to the four counts charging receipt of articles from Frank Pesce, counts 4, 5, 14 and 16 (Pet. App. 19a-26a), the indictment was "fatally defective" because there was "absolutely no pleading by the plaintiff herein that Pesce or Best Sanitation

[Pesce's company] was an industry affecting commerce or that its employees were employed in an industry affecting commerce" (Pet. 30a). Paragraph 6 of count 1, which was incorporated by reference into each of the relevant counts, set forth merely that (Pet. 28a):

> At all times pertinent hereto, Best Sanitation and Supply Co. (hereinafter referred to as "Best") maintained an office in Chicago, Illinois, and Frank Pesce was the owner of said Best.

On August 25, 1965, District Judge Igoe granted petitioner's motion to dismiss the indictment without stating his reasons.

On June 1, 1966, a grand jury returned the present indictment, naming petitioner as a defendant in four of the counts—numbers 4, 5, 6 and 8. These counts (set forth at Pet. 19a-26a) are in all relevant respects identical to counts 4, 5, 14 and 16 of the indictment dismissed by Judge Igoe, with one exception. The difference is that paragraph 6 of count 1 of the new indictment, which is incorporated by reference into each of counts 4, 5, 6 and 8, adds the words "and said Best was engaged in an industry affecting commerce".

On November 17, 1966, petitioner filed a motion (Pet. 8a) before District Judge Parsons to dismiss counts 4, 5, 6 and 8 of the instant indictment on the ground that they were identical to counts 4, 5, 14 and 16 of the indictment previously dismissed by Judge Igoe. He argued that Judge Parsons had no authority to redetermine a question of law previously deter-

mined by another district judge (Pet. 9a-18a). The motion was denied without opinion on April 4, 1967.

On September 8, 1967, petitioner filed a writ of prohibition (Pet. 1a-7a) in the United States Court of Appeals for the Seventh Circuit seeking an order directing Judge Parsons to proceed no further in the instant case and to honor the prior ruling of Judge Igoe. The court of appeals denied the petition for a writ of prohibition (Pet. 50a-51a).

ARGUMENT

The denial of the petition for a writ of prohibition was proper. Contrary to petitioner's assertion, the second indictment was not identical to the first. It differed in its allegation as to an important jurisdictional fact—that Best was engaged in an industry affecting interstate commerce. It was the lack of such an allegation which petitioner had argued was fatal when he moved to dismiss the original indictment. In these circumstances the government was obviously not estopped from filing a new indictment incorporating the additional allegation, nor was Judge Parsons barred from upholding it. See *United States* v. *Mathies*, 350 F.2d 963 (C.A. 3).

There was, in any event, no reason for a writ of prohibition. Even if it were to be assumed that Judge Parsons erred in refusing to dismiss the second indictment it is an error which could be adequately corrected on appeal. See *Roche* v. *Evaporated Milk Association*, 319 U.S. 21; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379; *Parr* v. *United States*,

351 U.S. 513. No special cause is present in this case to justify the circumvention of the normal appellate process by the grant of the extraordinary writ of prohibition. See *Roche* v. *Evaporated Milk Association*, *supra*, at 27-30.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

NOVEMBER 1967

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